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No. 86-1718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE KANSAS CITY, MISSOURI SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

THE STATE OF MISSOURI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY OF THE KANSAS CITY, MISSOURI SCHOOL DISTRICT AND ITS SUPERINTENDENT TO RESPONDENTS' OPPOSITIONS

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ARGUMENT

The respondents have crafted their oppositions artfully to avoid responding to the three central points raised by the petitions for certiorari:

- The Eighth Circuit's plurality opinion upholds a district court ruling that plainly misreads *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Contrary to *Milliken*'s holding that proof of interdistrict effects of a State system of school segregation would be sufficient to warrant inclusion of affected districts in the remedy, the district court required

proof of a constitutional violation by each defendant school district.[1]

- The district court's erroneous reading of *Milliken* so completely infected its findings that they should not be allowed to stand, let alone to impede thorough appellate review of the district court's legal error. *See Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982).[2]
- The conflict in the circuits centers squarely on whether defendant school districts may be held liable to rectify conditions of governmentally imposed segregation that affected them regardless of whether those districts have been intentional wrongdoers.[3] The affirmance here of a ruling that clearly requires intentional violations by each separate defendant adds to this confusion among the courts of appeals.

The respondents attempt to dodge the conflict between the legal ruling of the district court and the law as stated by this Court by cleverly distorting the record on each critical point. The holdings of the courts below, when viewed free of respondents' wishful interpretations, indeed are contrary to controlling decisions of this Court on a matter of fundamental importance and contribute to a conflict in the circuits.

1. On the first point—the district court's misreading of *Milliken*—respondents quote selectively to create the impression that the district court correctly held that effects on a school district of the State's interdistrict viola-

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[1] Pet. at 13-17. "Pet." refers to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit of the Kansas City, Missouri School District and Its Superintendent, in No. 86-1718. "App." refers to the Appendix to the Petition for Writ of Certiorari filed by Kalima Jenkins, *et al.*, No. 86-1717.

[2] Pet. at 17-19.

[3] Pet. at 19-23.

tions can warrant the district's inclusion in an interdistrict remedy. Respondents then extract snippets from the district court's orders in which the term "effects" was used and argue that the district court applied the proper legal standard but that its fact findings precluded a judgment against the surrounding school districts.[4] A reading of the district court's June 5, 1984 Order, however, demonstrates that the court never adopted the proper legal standard, much less engaged in fact findings under it.[5]

For example, the school district respondents claim that "[t]he district court's June 5, 1984 findings described accurately the petitioners' trial theories" but that when "'*considered in light of the evidence,*' 284a-85[a] (emphasis supplied), the district court rejected the factual predicates necessary to support those theories."[6] In fact, at the cited pages, the district court quoted the plaintiffs' legal arguments and then rejected them. The full quote from the district court, which was truncated in the School Districts' Opposition, reads: "These theories, when considered in light of the evidence *and the prevailing legal standards*, must be rejected."[7] The district court then proceeded to enunciate its incorrect view of the "prevailing legal standards" which were the touchstone of its analysis:

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[4] *See* Brief in Opposition for State Respondents ("State Opp.") at 3; Joint and Consolidated Brief in Opposition for North Kansas City School District, *et al.* ("School Districts' Opp.") at 5; Memorandum for the Federal Respondents in Opposition ("Federal Opp.") at 7-9.

[5] The Federal respondents implicitly acknowledge that the district court was less than faithful to *Milliken* when they seek to divert scrutiny from the discussion of *Milliken* in the district court opinion to the statements of the court of appeals. *See* Federal Opp. at 9.

[6] School Districts' Opp. at 5.

[7] App. 284a-85a (emphasis added).

> Because this is an interdistrict case, all the evidence comprising this voluminous record must be weighed by that standard. Intradistrict cases are inapplicable. The linchpin of an interdistrict case, as declared by the Supreme Court, is whether there has been a racially discriminatory act *by each defendant* that substantially caused segregation in another district. *Milliken* v. *Bradley*, 418 U.S. 717, 745 (1974) (Milliken I).[8]

The State respondents' rendition of what the district court held fares no better when compared to the actual text of the June 5 Order. The State respondents claim that "the [district] court held that the pre-1954 State segregation policy had no significant current interdistrict effects, finding plaintiffs' proof on this point to be 'weak, speculative, and in any event *de minim*[*i*]*s*.' Pet. App. 301a."[9] In fact, at that page of the June 5 Order, the

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[8] App. 285a (emphasis added). The district court made similar incorrect statements of the *Milliken* holding throughout the June 5, 1984 Order. *See, e.g.*, App. 304a ("the majority [in *Milliken* demanded that] there be a violation or *cause*, by each defendant district as well as an interdistrict *effect*" [emphasis in original]). The district court concluded at the end of its findings with respect to each school district defendant that it would grant the district's motion to dismiss since the plaintiffs had "failed to establish any intentional racially discriminatory act or omission by these defendants which has had a substantial segregative effect in any other school district." App. at 376a (Blue Springs); 384a (Center); 391a (Fort Osage); 397a (Grandview); 410a (Hickman Mills); 427a (Independence); 443a (Lee's Summit); 453a (Liberty); 466a (North Kansas City); 483a (Park Hill); 492a-93a (Raytown).

Similarly, the School Districts' Opposition suggests at page 10 that the district court's January 25, 1985 Order adopts the correct reading of *Milliken*. In fact, that Order states at the outset that "[t]he eleven [surrounding school] districts were previously defendants in this suit and were dismissed by this Court because of the failure of the plaintiff to show that those defendants had acted in a racially discriminatory manner that substantially caused racial segregation in another district. *See*, Order filed June 5, 1984." Order of January 25, 1985 at 1.

[9] State Opp. at 3-4.

district court used the quoted phrase to describe plaintiffs' proof of cause *and* effect of interdistrict segregation, and prefaced its discussion by stating the following requirements for proving that surrounding school districts caused interdistrict segregation: "Because each defendant district is independent and autonomous from the state of Missouri, and from all other school districts, none has an affirmative duty to merge with other districts. None can be held vicariously liable for the acts of the state, federal government or other entities." [10]

The State respondents further claim that "the [district] court determined that the pre-1948 State enforcement of racially restrictive covenants had no significant current interdistrict effects. Pet. App. 363a." [11] The cited passage of the June 5 Order actually illustrates the district court's *Milliken* error: "Dr. Tobin also testified extensively regarding racially restrictive covenants that were utilized and enforced until 1948. (Tr. 13,005, 13,012-14). There was no evidence such covenants were enforced by the state courts following *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). *Nor was there any evidence that any SSD [suburban school district] was involved in the placement or enforcement of any racially restrictive covenant.*" [12]

Respondents also cite the Eighth Circuit plurality opinion to support their suggestion that the district court's reading of *Milliken* was consistent with petitioners'. The plurality opinion does attempt at points to portray the June 5 Order as consistent with *Milliken*.[13] Significantly, however, Judge Arnold in his concurring and dissenting opinion made crystal clear that the district court insist-

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[10] App. 300a.

[11] State. Opp. at 4.

[12] App. 363a (emphasis added).

[13] *See* App. 53a-54a.

ence that each surrounding school district must have been shown to have committed a racially discriminatory act that substantially caused segregation in another district "involves a misconstruction of *Milliken*." [14] Judge Arnold challenged the court to take a position on this key legal issue, chiding the plurality for not making "clear its precise view of the District Court holding that because the SSDs are not themselves constitutional wrongdoers, they may not be made part of an interdistrict remedy for State housing violations." [15] Judge Arnold recognized the ambiguity in the plurality opinion that the respondents play on here, but also the fundamental error in construing the district court's opinion to mean anything other than that the school district respondents were dismissed because the district court concluded they had not committed separate constitutional violations:

> At points, the [plurality] opinion appears to agree that *Milliken* precludes inclusion of non-culpable SSDs in an interdistrict remedy for State violations. See *ante* at 28-31. At other points, however the opinion suggests that the District Court viewed the lack of SSD culpability simply as an important factor in determining that interdistrict relief was inappropriate, a factor considered along with factual findings as to the lack of interdistrict effects of state-fostered housing discrimination. See *ante* at 26, 28, 29. This is a mischaracterization of the District Court's position which understates the significance the District Court attached to SSD innocence. The District Court repeatedly made clear its view that the fact that the SSDs were not constitutional violators, taken by itself, *barred* requiring SSD participation in an interdistrict remedy. See Opinion of June 5 at 6, 34-42, 45, 47-48, 51, 53-54, 58-59, 66-67, 73-74, 78, 82-83, 89-91, 94-95, 97, 100-103. Further, the District Court did not determine whether or what

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[14] App. 143a.

[15] App. 145a n.1 (emphasis in original).

> interdistrict segregation is attributable to State housing violations, and never claims to have made such a determination; instead, having concluded that SSD innocence precluded interdistrict relief, the District Court found it unnecessary to devote substantial consideration to the question of interdistrict effects.[16]

Like the respondents here, the plurality simply ignored Judge Arnold's description of the district court's legal error, although the June 5 Order makes clear that it was the key to dismissal of the surrounding school districts. The plurality thus necessarily affirmed the district court's misreading of *Milliken* on this key issue.

2. Respondents repeatedly claim that fact findings stand in the way of appellate review here, without acknowledging the legal error that underlies the findings. The district court's legal error is the crux of the issue because where, as here, the legal standard is incorrect, findings of fact that rest on that standard may be set aside.[17] The Federal respondents' assumption that "even if all of petitioners' legal contentions were accepted, it would not change the judgment in this case" is a particularly striking misstatement of the factfinding process here.[18] The district court entered those findings under an incorrect legal standard, and only a court looking at the record and properly applying the holding in *Milliken* could say whether the judgment would change. The court of appeals has not undertaken that task. Instead, the plurality took pains to preserve district court findings as

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[16] App. 145a n.1.

[17] *E.g.*, *Thornburg* v. *Gingles*, —— U.S. ——, 106 S. Ct. 2752, 2782 (1986); *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 501 (1984); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982). This principle is not in conflict with *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985). In *Anderson*, no argument was made to the court of appeals or this Court that the findings of fact were infected with an incorrect legal standard.

[18] Fed. Opp. at 7.

though they were entered in isolation from the district court's error of law.

3. A reading of the sharply conflicting opinions in the Eighth Circuit in this case reveals that the issue here is a dispute over the correct reading of *Milliken* and not over facts peculiar to Kansas City. The courts of appeals —like the Eighth Circuit judges—have splintered precisely on whether *Milliken* requires proof of independent violations by each school district defendant. The State and school district respondents coyly try to harmonize the court of appeals opinions by arguing that all required a showing of interdistrict effects from the interdistrict violation.[19] That, however, is not in dispute. The split in the circuits is over what the legal standards are to determine a violation. Respondents do not address the conflicting holdings in the courts of appeals on that issue.[20]

The disingenuousness of the State and school district respondents' characterization of the case law is more fully revealed by the positions they took below. The school district respondents argued strenuously in the court of appeals, citing *Taylor* v. *Ouachita Parish School Board*, 648 F.2d 959 (5th Cir. 1981), that "effects alone" should not be sufficient to subject school district defendants to an interdistrict remedy.[21] The only exception they would admit to "*Milliken*'s proscription against interfering with autonomous school districts to remedy violations by a state

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[19] *See* School Districts' Opp. at 22-23; State Opp. at 16-19.

[20] *See* Pet. at 19-23. *Compare Lee* v. *Lee County Bd. of Educ.*, 639 F.2d 1243 (5th Cir. 1981) and *Taylor* v. *Ouachita Parish School Bd.*, 648 F.2d 959 (5th Cir. 1981) with *Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del), *aff'd*, 423 U.S. 963 (1975) and *United States* v. *Bd. of School Comm'rs*, 573 F.2d 400 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978).

[21] Consolidated Brief of Appellee School Districts and Their Superintendents (Nos. 85-1765WM, 85-1949WM, 85-1974WM) at 35-39.

government" was "racial gerrymandering."[22] Having succeeded in convincing the Eighth Circuit plurality to affirm, they now, for the first time in this protracted litigation, acknowledge that interdistrict segregative effects other than gerrymandering could have subjected them to liability. Unless this Court grants the petitions, corrects the lower courts' legal error, and remands for factfinding under the appropriate legal standard, the school children of Kansas City will be deprived of the application of the legal principles that even the respondents belatedly admit are correct.

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[22] *Id.* at 37. The State respondents' Eighth Circuit Brief also carves out so-called "gerrymandering" or "boundaries" cases as a special category of interdistrict effects. *See* Brief of State Appellees-Cross Appellants (Nos. 85-1765WM, 85-1949WM, 85-1974WM) at 39:

> The opinion in *Milliken I* is thus an unreliable place to look for clear authority that a court can abolish independent, autonomous school districts in the absence of any indication that they are responsible for an existing unconstitutional condition. On the contrary, the emphasis in *Milliken I* on local autonomy strongly suggests that a federal court may not undertake to do away with a school district simply on a showing that it was somehow affected by the constitutional violation of another party. That situation is very different from a situation in which the boundaries of the district have been drawn with discriminatory purpose (and may thus be suspect from the start) or in which the district committed acts causing significant current segregation somewhere else. Only in the latter cases can a school district properly be said to have forfeited the right to assert its independence. [Footnote omitted.]

The Eighth Circuit plurality's rule that interdistrict effects can give rise to interdistrict liability against school districts only in gerrymandering cases (App. 95a) is thus not "wholly imaginary" as the State respondents now claim (State Opp. at 18); it is a rule which they created and commended to the Eighth Circuit, although it is without foundation in *Milliken*.

CONCLUSION

For all of the foregoing reasons, and those stated in the Petition for Certiorari, we respectfully urge the Court to grant a writ of certiorari.

Respectfully submitted,

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